83-1247

No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

POWELL MANUFACTURING COMPANY, INC.
Petitioner,

v.

HARRINGTON MANUFACTURING COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit has jurisdiction of Petitioner's appeal from a district court order holding the prosecution of the complaint - on the merits and as a matter of law - not barred by a recent consent judgment of settlement of all controversies between the same parties, or by the compulsory counterclaim rule, and refusing an injunction.

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The Opinion of the district court is unreported and is reproduced in the Appendix to this Petition. The Order of the Court of Appeals is unreported and is reproduced in the Appendix to this Petition.

JURISDICTIONAL GROUNDS

The date and time of entry of the judgment of the court of appeals sought to be reviewed is September 19, 1983. A Petition for Rehearing was denied October 28, 1983. A Suggestion for Rehearing En Banc was declined October 28, 1983. This Court has jurisdiction to review the judgment herein by Writ of Certiorari under 28 U.S.C. § 1254(1).

Petitioner prays that a Writ of Certiorari issue to review the judgment below upon the grounds that the United

States Court of Appeals for the Federal Circuit has rendered a decision interpreting the collateral order doctrine in a way in conflict with the decision of this Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949); and has rendered a decision in conflict with the decisions of other courts of appeals applying the collateral order doctrine, including In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981); Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979); United States v. United Fruit Co., 410 F.2d 553 (5th Cir. 1969); McSurely v. McClelland, 521 F.2d 1024 (D.C. Cir. 1975); and Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977); and has adversely decided the question of appellate jurisdiction to review a refusal on the

merits to grant an injunction, which ought to be settled by this Court, and which is an important federal question expressly left open in Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23, 87 S. Ct. 193, 17 L. Ed. 2d 23 (1966).

STATUTES INVOLVED

28 U.S.C. § 1291 provides, in pertinent part:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States ... The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title. [Emphasis added.]

28 U.S.C. § 1292 provides, in pertinent part:

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States ... or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions ...

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order ....

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction --

> (1) of an appeal from an interlocutory order or decree

> described in subsection (a) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; ....

28 U.S.C. § 1295 provides, in pertinent part:

> (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction --
>
> (1) of an appeal from a final decision of a district court of the United States ... if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights or trademarks and no other claims under 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title; ....

28 U.S.C. § 1338(a) provides:

> (a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of

the states in patent, plant variety protection and copyright cases.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked solely under 28 U.S.C. § 1338(a). This appeal, however, does not present patent law questions for decision.

The pleadings in this case involve two actions which are separate but related to the same factual subject matter - this patent infringement action brought by Harrington Manufacturing Co., Inc. ("Harrington"), against Powell Manufacturing Co., Inc. ("Powell"), April 6, 1982, and also an unfair competition action brought by Powell against Harrington ("the former action"). The former action in the United States District Court for the Western District of North Carolina was

concluded by compromise settlement of all controversies on November 10, 1981. Powell asserted the pleadings and consent decree filed in the former action as a bar to prosecution of Harrington's complaint in this action. The district court ruled adversely to Powell on the pleas in bar on the merits and as a matter of law. Powell appealed.

Pleadings and Motions

Harrington in this action claims rights to recover - dating from about 1976 - for infringements of Harrington's automated tobacco harvester patents.[1] Harrington, in aid of validity of its patent rights, alleged the "commercial

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[1]The amended complaint alleged Powell infringement of Harrington's U. S. Patents Nos. 3,307,103; 3,902,304; 3,601,959; and 3,841,071.

success" of its automated harvester since 1970, the automated harvester having been marketed in competition with the one marketed by Powell since about that time. Harrington alleged Powell infringed the '959 and '071 patents "by manufacturing ... defoliator blades for its tobacco harvesters which constitute a material part of the inventions of said '959 patent and '071 patent ...." [Emphasis added.] (R. App. 6-13.)[2]

Powell's answer denied validity and infringement of Harrington's patents. (R. App. 63-94.) Powell's answer affirmatively pleaded that Rule 13(a) of the Federal Rules of Civil Procedure barred Harrington's claims for failure

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[2]The designation "R. App. _____" refers to the Appendix filed in the court of appeals. The designation "Appendix _____" refers to the Appendix to this Petition.

to allege them as compulsory counter-claims in Harrington's Answer (filed March 6, 1981, R. App. 93) to Powell's Amendment to Complaint (attached as Exhibit A to Powell's Answer, R. App. 79-89) filed February 9, 1981, in the former action. The Powell Amendment to Complaint in the former action (Exhibit A to Answer herein) alleged that dating from about 1962, Powell was manufacturing defoliator blades for its tobacco harvester which Harrington in September, 1974, purchased from a Powell dealer, mounted on a Harrington harvester, and thereafter falsely demonstrated to tobacco farmers as Harrington's own product, "a dramatic break-through in harvesting tobacco."[3] Powell alleged

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[3]Before voluntary dismissal of this claim filed in the state court and its

that Harrington from and after September, 1974, had thereby wrongfully diverted tobacco harvester sales and profits from Powell to Harrington. Powell prayed for an accounting of Harrington's profits obtained by unfair competition. Powell also pleaded in bar of Harrington's complaint the November 10, 1981, consent judgment of compromise settlement of all controversies between Powell and Harrington in the former action. Powell prayed that Harrington and Harrington's privies be permanently enjoined from charging Powell, Powell's vendees, and Powell's dealers with

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subsequent joinder in the former action, this Powell claim was held to state a claim for unfair competition under § 75-1.1 of the North Carolina General Statutes. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N. C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

infringement of the alleged four Harrington patents.

The written compromise settlement incorporated in the consent decree provides as follows:

> Counsel fell to talking about compromise settlement and have now arrived at a compromise and settlement of all matters and things in controversy among [the parties] and there has been paid and received a sum certain in completion of that settlement ....
>
> (Appendix 66, 67.)

Pursuant to the compromise, Harrington paid Powell $100,000 as a part of the settlement of all controversies. Harrington next brought this patent infringement action on April 6, 1982, less than five months after settlement of all controversies between the parties.

Powell filed motions for summary judgment, for an injunction and for

judgment on the pleadings (R. App. 49,99). Powell's motions contended that, on three separate grounds, the present infringement action by Harrington is barred. Powell contended that the present action is barred as a result of the settlement of all controversies incorporated in the consent judgment in the former action. Powell also pointed out that in the former action between Powell (as plaintiff) and Harrington (as defendant), Harrington failed to allege its patent infringement claims, which were compulsory counterclaims under Rule 13(a) of the Federal Rules of Civil Procedure, and is therefore barred from maintaining an action on all patents now in issue. Finally, Powell argued that the principles of res judicata and collateral estoppel prevent

Harrington from maintaining the present infringement action against Powell.

At the hearing of Powell's motions, the following dialogue took place between the court and Harrington's counsel:

> The Court: Well, what does the language mean, "all matters in controversy"?
>
> ...
>
> The Court: ... In my experience in lawsuits, when the parties get together and agree upon a compromise and settlement, they try to resolve all their differences between them so they don't have to come back into court three months later.
>
> ...
>
> The Court: What would the extrinsic evidence be?
>
> Mr. Jacobson: It would be the intent of the parties and perhaps the understanding of the people who were there at the time; factual issues.
>
> The Court: Now, how would Judge McMillan's understanding of the judgment have any bearing on it?

> Mr. Jacobson: It might have a bearing, not so much his understanding of the judgment but his understanding of the agreement ...
>
> ... and Judge McMillan then becomes a witness.
>
> The Court: And the attorneys become witnesses.
>
> Mr. Jacobson: Of course.
>
> (R. App. 107-109.)

Harrington offered no evidence at the hearing which would limit the phrase "all matters in controversy." Nor did Harrington offer proof that such evidence even exists. Powell's position was, and still is, that parol evidence to vary the consent decree is inadmissible. The basis for Powell's position was asserted in the district court to be Fayerweather v. Ritch, 195 U.S. 276, 25 S. Ct. 58, 49 L. Ed. 193 (1904).

The District Court's Order

The district court entered an order (filed May 24, 1983, Appendix 44) adopting (and modifying in a minor particular) the Magistrate's Memorandum and Recommendation (filed February 8, 1983, Appendix 1-43), denying - on the merits and as a matter of law - Powell's motions for summary judgment and judgment on the pleadings. Only issues of law were involved in the rulings, the essential facts not being disputed.

The district court applied the Fourth Circuit's res judicata test of a compulsory counterclaim announced in Sam & Sue Mfg. Co. v. B-L-S Constr. Co., 538 F.2d 1048, 1051-1053 (4th Cir. 1976)(R. App. 146-148, Appendix 22-29). The district court thus held that because Harrington's claims were not

barred by res judicata, they were also not barred by Rule 13(a) of the Federal Rules of Civil Procedure. The district court held that the agreement in the consent decree, settling all controversies among the parties, settled only the claims actually stated in Powell's complaint (Harrington not having stated any claims). (R. App. 140-142, Appendix 7-13.)

The judge made a certification to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1292(b), filed May 31, 1983.

Powell on June 21, 1983, filed a notice of appeal to the United States Court of Appeals for the Federal Circuit "from the Order denying [the] application for injunction and [the] motions for judgment on the pleadings and

summary judgment entered in this action on the 24th day of May, 1983." (R. App. 191.)

The Court of Appeals' Orders

The court of appeals entered an order dated June 22, 1983, denying Powell's Petition for Permission to Appeal under 28 U.S.C. § 1292(b) pursuant to the judge's certification on the grounds that the court of appeals lacked appellate jurisdiction under that section. (Appendix 53.)

Harrington filed a motion to dismiss Powell's appeal. In response, Powell insisted its pleas in bar were substantial and meritorius. The United States Court of Appeals for the Federal Circuit noted that Powell "seeks appellate review under 28 U.S.C. § 1295(a)(1) ... [and] also seeks appellate review under

28 U.S.C. § 1292(c)(1)." The court held, "[a]t this point in the proceedings, however, neither § 1295(a)(1) nor § 1292(c)(1) gives us jurisdiction over this case." (Appendix 56.) The court held that the order of the district court, ruling that Harrington's infringement claims were not barred by compromise and settlement nor by Rule 13(a), lacked the finality required by Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

The court of appeals noted:

> When the Magistrate denied these motions, he correctly pointed out that this denial necessarily implied a denial of injunction. (Appendix 60.)

The court notwithstanding granted Harrington's motion to dismiss for lack

of appellate jurisdiction. (Appendix 55 - 61.)

REASONS FOR GRANTING THE WRIT

I. The District Court's Order Is A Final And Reviewable Decision.

This Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221 (1949), recognized an exception to the oft stated requirement that federal appeals await a final judgment on the merits. Termination of the proceedings was held not a prerequisite to federal appellate jurisdiction under 28 U.S.C. § 1291(a) which provides for appeals of "final decisions."[4] Rather, as Mr. Justice Jackson, the author of Cohen, supra, noted subsequent

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[4] 28 U.S.C. § 1295 which particularly defines the scope of the CAFC's federal appellate jurisdiction also provides for review of "final decisions."

to the Cohen decision: "[I]t is a final decision that Congress has made reviewable ... While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." Stack v. Boyle, 342 U.S. 1, 12, 72 S. Ct. 1, 7 (1951), sep. opinion. This pragmatic approach, mandated by Cohen, supra, to the finality requirement recognizes that an appeal from a decision, which does not terminate the proceeding, may be necessary to preserve important rights, such as those appurtenant to the execution of a valid settlement of all claims. Moreover, in situations, such as the one presented in the instant case, wherein the litigation will terminate on appeal if Powell prevails on either of its pleas in bar, the

policy behind the finality requirement of preventing piecemeal appeals with its concommitant waste of judicial resources would actually be served by allowing the appeal. Patent litigation is notoriously protracted, costly, and complex and judicial resources will be saved if the proceedings are terminated by a successful appeal.

Cohen, supra, involved a shareholder's derivative action in which federal jurisdiction was based upon diversity of citizenship. Before final judgment was entered, an issue arose as to whether a newly enacted state statute, requiring a derivative suit plaintiff to post security, applied in federal court. The district court held that it did not, and the defendants appealed. The United States Court of Appeals for the Third

Circuit reversed and ordered that the plaintiff post security. This Court concluded that the court of appeals had properly exercised jurisdiction to review the ruling of the trial court. This Court held that the district court "decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id. at 546, 69 S. Ct. at 1225-26. This Court further stated that:

> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that

> every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question. [Emphasis added.]

Id. at 547, 69 S. Ct. at 1226.

The denial of Powell's motions for summary judgment and judgment on the pleadings constitutes a complete and final rejection of Powell's claim that Harrington's suit is barred by the settlement executed between the parties in a prior action and by the failure of Harrington to assert its claim against Powell in that prior action. Both of the pleas in bar are collateral to and separable from the principal issues of patent infringement. Moreover, important rights conferred by the valid

settlement and by the res judicata effect of the failure to assert a compulsory counterclaim would be irretrievably lost if appellate review of Powell's pleas in total bar were postponed until after the termination of the patent litigation on the merits.

A. The district court's order finally rejected Powell's pleas in total bar.

This Court has often emphasized that the requirement of finality is to be given a "practical rather than a technical construction." Cox Broadcasting Corp. v. Cohn, 420 U.S. 478, 486, 95 S. Ct. 1029, 1037 (1975), quoting Cohen, supra, Id. at 546, 69 S. Ct. at 1221. In Abney v. United States, 431 U.S. 651, 97 S. Ct. 2034 (1977), this Court, in holding that a district court's pretrial order denying a motion to dismiss on

double jeopardy grounds was appealable, observed that "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee. Hence, Cohen's threshold requirement of a fully consummated decision is satisfied." Id. at 659, 97 S. Ct. at 2040. Similarly, there are no further steps that can be taken in the district court in the instant case to enforce Powell's pleas in bar (which the district court rejected as a matter of law) to avoid the patent litigation which Powell contends is totally barred.

The Court of Appeals for the Federal Circuit erroneously held that the district court's ruling that Harrington is not now barred because of its failure

to assert its claims against Powell in prior litigation was "[c]learly ... interlocutory, not final." (Appendix 58.) On the contrary, the district court determined as a matter of law that Harrington's present action was not a compulsory counterclaim in the former action. The question was one of law to be determined upon the pleadings in both actions. The district court's construction of the determinative pleadings was not tentative or interlocutory.

Moreover, the court of appeals' statement that "Powell can still press the issue by introducing extrinsic evidence at trial to prove its assertions regarding the real intent of the parties as reflected in the consent judgment" (emphasis added) (Appendix 57, 58) offers a hope that is merely

illusory. For all practical purposes, the district court's order constitutes a final rejection of Powell's plea in bar. The district court ruled after consideration of a complete record (Appendix 44). Even if either Powell or Harrington had contended that it had pertinent evidence extrinsic to the record (which neither party has claimed), such extrinsic evidence would not be admissible in the trial court to engraft exceptions on the consent judgment of "settlement of all matters and things in controversy" (Appendix 66). Those matters were well enough known to Harrington to be listed as exceptions in the consent judgment itself, which Harrington failed to do.

The finality of a consent decree was defined by this Court in United States v.

Armour & Co., 402 U.S. 673, 91 S. Ct. 1752 (1971), in ascertaining the parameters of the Meat Packers Consent Decree of 1920. This Court held that the language of a consent decree must be "taken in its natural sense," Id. at 678, 91 S. Ct. at 1755, and that "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." Id. at 682, 91 S. Ct. at 1757.

The court of appeals ruling would permit the engrafting of exceptions upon the decree of settlement contrary to Armour & Co., supra, and also the general rule applicable to settlement. The Court of Claims, the predecessor to the Court of Appeals for the Federal Circuit, in Johnson, Drake & Piper, Inc.

v. United States, 531 F.2d 1037 (Ct. Cl. 1976), held:

> "The rule for releases is that absent special vitiating circumstances, a general release bars claims based upon events occurring prior to the date of the release. [Authority omitted.] And no exception to this rule should be implied for a claim whose facts are well enough known for the maker of the release to frame a general description of it and request an explicit reservation."
>
> Id. at 1047.

Accord, Houston v. Trower, 297 F. 558 (8th Cir. 1924)("settles all claims" held to bar existing but also unknown claims). The United States Court of Appeals for the Ninth Circuit in De Hart v. Richfield Oil Corp., 395 F.2d 345 (9th Cir. 1968), a case similar on the facts to the instant case, held that the parol evidence rule barred introduction of extrinsic evidence to prove it was not appellant's intention in a release

to settle a certain contract claim existing but not under discussion when the release was signed. Moreover, the trial judge who signed the consent judgment is barred from giving oral testimony of what he interpreted the judgment to mean. Fayerweather v. Ritch, 195 U.S. 276, 25 S. Ct. 58, 49 L. Ed. 193 (1904) ("A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision." 25 S. Ct. at 67, 68). The finality of the consent decree in the former action is a question of law for the court and not a question of fact for a jury.

The finality of the district court's order makes it distinguishable from the ones before this Court in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 101 S. Ct. 669 (1981), and United States v. MacDonald, 435 U.S. 851, 98 S. Ct. 1547 (1978). This Court held that orders denying a motion to disqualify the opposing party's counsel and denying a motion to dismiss an indictment on the grounds of violation of the right to a speedy trial, respectively, were not final orders within the purview of the Cohen, supra, collateral order doctrine. The propriety of a district court's denial of a motion to disqualify opposing counsel is often difficult to assess until its impact on the underlying litigation can be evaluated, which is normally subsequent to the final judg-

ment. 449 U.S. at 377, 101 S. Ct. at 675. Similarly, most speedy trial claims are best considered only after the relevant facts comprising the essential elements of a speedy trial claim have been developed at trial. 435 U.S. at 859, 98 S. Ct. at 1552.

In contrast to Risjord, supra, and MacDonald, supra, the factors necessary to the district court's determination of Powell's pleas in bar are all present in the record; the district court thus resolved the same questions in the same way that they would have been resolved after a lengthy and expensive trial. The compulsory counterclaim plea was determined by the district court as a matter of law after an examination of the pleadings in both actions between the parties and the consent judgment

must be interpreted within its "four corners." Armour, supra.

Although, generally the denial of a motion for judgment on the pleadings or summary judgment does not finally dispose of any claim, and is therefore not appealable, such is not this case where the motions are based on claims of right to be determined, not as a matter of disputed fact nor as a matter of discretion, but as a matter of law. The procedural posture of the instant case is comparable to the one in Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979. There the court after noting that generally the denial of a motion for summary judgment is not appealable, held that "the denial of the defendants' motions for summary judgment on the issue of absolute immunity is appealable

under the Cohen collateral order doctrine." Id. at 1208.

Finally, the trial judge's certification illustrates his belief that the order denying Powell's motions for summary judgment and judgment on the pleadings is ripe for review at this stage of the proceedings. Moreover, such a certification reflects the trial judge's opinion that his rulings involve "a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

B. Powell's pleas in bar are separable from and collateral to the rights asserted in the action.[5]

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[5] It must be noted that the court of appeals' denial of jurisdiction rested solely on the grounds that the district court's order was not final; the CAFC did not challenge Powell's assertion that it met the other tests of the collateral order doctrine.

The gravamen of Harrington's complaint in this action is that Powell allegedly infringed four of Harrington's patents relating to tobacco harvesters (R. App. 6-13). A determination of Powell's claim that Harrington's present action is barred because of a consent judgment and because Harrington's claims were compulsory counterclaims in the prior action between the parties does not require consideration of the merits of Harrington's patent infringement claims or an examination of the facts as they might develop at the trial itself. As discussed in section A above, the viability of Powell's pleas are determinable (and were determined) from an examination of the pleadings in both actions and the consent judgment itself. The situation in the instant case is

therefore distinguishable from the one presented in Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S. Ct. 2454 (1978), where the information gleaned from the trial process was pertinent to a resolution of the defenses presented. In Coopers & Lybrand, supra, this Court held that a determination by the trial court that the action could not be maintained as a class action was not appealable before the trial on the merits partly because class determination often involves considerations that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Id. at 469, 98 S. Ct. at 2458, quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558, 83 S. Ct. 520, 522 (1963).

The pleas in bar in the instant case are no less collateral than the bars of double jeopardy (Abney v. United States, supra), of absolute immunity or privilege (Forsyth v. Kleindienst, supra), claim of right to anonymity, (Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981), held collateral in the cases cited above. The "separate from the merits" requirement of Cohen, supra, is a distillation of the principle that there should not be piecemeal review of steps toward a final judgment in which they will merge. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 103 S. Ct. 927 (1983). Not only will a determination of Powell's pleas in bar not merge with a final judgment, a trial on the merits will be avoided if Powell is successful on even one of its claims that the present action is totally barred.

C. Powell will suffer irreparable harm if appellate review of the district court's rejection of its pleas in bar must await termination of the litigation on the merits.

The rights conferred to Powell by the execution of a valid settlement barring the claims asserted in the present action and by the res judicata effect of the failure to assert a compulsory counterclaim will be lost if appellate review of Powell's pleas in bar is postponed until after the trial on the merits.

Generally, a judgment or order entered by consent is conclusive on the matters it includes; it "precludes the parties from 'maintaining an action upon any claim within the scope of [their] compromise and settlement, although such claim was not in fact litigated in the suit in which the judgment or the decree

was rendered.'" Tridyn Indus., Inc. v. American Mut. Liab. Ins. Co., 46 N. C. App. 91, 94, 264 S.E.2d 357, 359 (1980), quoting 47 Am. Jur. 2d, Judgments, §§ 1091, 1092 (1969). Accord, Santana, Inc. v. Levi Strauss & Co., 674 F.2d 269 (4th Cir. 1982)(the right to pursue a contract claim was waived by the execution and retention of benefits under a valid settlement agreement). Therefore, the very purpose of the bar of a compromise settlement is to protect Powell from having to litigate the matters barred. The bar will fail of that essential purpose if appellate review is postponed. Moreover, the failure to file a compulsory counterclaim constitutes a waiver and the party is precluded by res judicata from ever suing on it. Local 11 Int'l. Bhd. of Elec. Work-

ers v. G. P. Thompson Elec., Inc., 363 F.2d 181 (9th Cir. 1966).

This Court has stressed that the "doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts." Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299, 37 S. Ct. 506, 508 (1917).

The Court of Appeals for the Federal Circuit, by its statement that "the decision [pertaining to the counterclaim issue] involved can be reviewed and corrected if and when final judgment results" (Appendix 58), erroneously deemed Federal Rule of Civil Procedure

13(a) a bar to the enforcement of a final judgment as opposed to a bar to the trial process itself.

The situation in the instant case is comparable to the ones before this Court in Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1 (1951)(order denying motion to reduce bail held appealable); Abney v. United States, supra, (order denying motion to dismiss an indictment on double jeopardy grounds held appealable); and Helstoski v. Meanor, 442 U.S. 500, 99 S. Ct. 2445 (1979) (order denying motion to dismiss indictment which allegedly violated Speech or Debate Clause held appealable). The demand for reduced bail in Stack, supra, the double jeopardy claim in Abney, supra, the Speech or Debate Clause claim in Helstoski, supra, and the posting of security in Cohen, supra,

each involved an asserted right, the legal and practical effect of which would be destroyed if it were not vindicated prior to a trial on the merits. This Court in Abney, supra, noted that "[a] cogent analogy can be drawn to the Cohen decision. There, the corporate defendant claimed that the state security statute, if applicable, conferred on it a right not to face trial at all unless the dissatisfied shareholder first posted security for the cost of the litigation. By permitting an immediate appeal under those circumstances, this Court made sure that the benefits of the statute were not 'cancelled out.'" Id. at 662, 97 S. Ct. at 2041. This Court in Abney, supra, further emphasized that "the Double Jeopardy Clause protects an

individual against more than being subjected to double punishment. It is a guarantee against being twice put to trial for the same offense." Id. at 660-61, 98 S. Ct. at 2041. Additionally, this Court in Helstoski v. Meanor, supra, stated that "the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves.'" Id. at 508, 99 S. Ct. at 2449, quoting Dombroski v. Eastland, 387 U.S. 82, 85, 87 S. Ct. 1425, 1427 (1967).

The type of harm necessary to meet the irrevocable harm test of the collateral order doctrine was underscored by this Court's decision in United States v. MacDonald, supra, wherein this Court

declined to hold that the postponement of an appeal from the refusal of the trial court to dismiss an indictment on speedy trial grounds caused the requisite irreparable harm. This Court stated that the "Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial. If the factors outlined in Barker v. Wingo, supra, combine to deprive an accused of his right to a speedy trial, that loss, by definition, occurs before trial ... Proceeding with the trial does not cause or compound the depri-

vation already suffered." Id. at 861, 98 S. Ct. at 1553.

In the case at hand, the right enjoyed by Powell, whether by virtue of the consent judgment or the res judicata effect of the failure to file a compulsory counterclaim is the right not to have to litigate. The trial process itself is a substantial harm against which Powell must be protected.

Additionally, absent interlocutory appellate review and during the pendency of trial, an important Powell product line will be substantially interdicted by Harrington's patent claims. Powell's business and reputation will be adversely affected during that interim. Moreover, Powell will be subjected to potential liability or claims of liability by additional sales and use of

that product line. The chilling of Powell's business is in itself sufficient irreparable harm to satisfy this part of the Cohen collateral order doctrine test.

An appeal from interlocutory orders prohibiting attorneys in a civil rights action from disclosing evidence obtained in subsequent depositions to the press was considered in In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981). The newspaper publisher, San Juan Star Co., prosecuted the appeal as intervenor. The appellate court ruled appellate jurisdiction existed on the grounds that the intervenor newspaper would suffer irreparable harm to its interest in reporting significant judicial proceedings if review were delayed until after trial on the merits. Powell's interest

in conducting its business of promoting a major line of its commercial product during the entire pendency of the Harrington action, free of Harrington's adverse claims, is no less significant or important to Powell than the rights asserted by the newspaper publisher, San Juan Star Co.

D. Powell's appeal will settle important and unresolved questions of controlling law.

Although not a controlling element of the Cohen collateral order doctrine test, the presence of an important and unsettled issue has been mentioned as a factor in favor of allowing an appeal. Cox v. Cohn, supra.

The Court of Appeals for the Federal Circuit in this action was called upon to resolve important questions of controlling law. This is underscored by

the trial court's certification of its decision for review. (Appendix 51.) The court of appeals was requested to determine questions arising out of the district court's order, inter alia, whether this Court's logical relationship test of a compulsory counterclaim outlined in Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S. Ct. 367 (1926), and adopted in equity cases applies under Rule 13(a) of the Federal Rules of Civil Procedure; whether Federal Rule of Civil Procedure 13(a) requires the assertion of a compulsory counterclaim in an answer to an amended complaint; whether the four corners doctrine enunciated in United States v. Armour & Co., 402 U.S. 673, 91 S. Ct. 1752 (1971), prevents the introduction of extrinsic evidence to engraft an

exception on the plain scope of a consent judgment; and whether district courts in patent cases on non-patent law questions are bound by the decisions of their respective circuits rather than by the decisions of the Court of Appeals for the Federal Circuit.

II. The Court Of Appeals Has Jurisdiction Of This Appeal Pursuant To 28 U.S.C. § 1292 (a)(1).

This Court reviewed an appeal from an order denying a motion for summary judgment, the denial being solely upon the grounds of existence of genuine issues of material fact, in Switzerland Cheese Ass'n v. E. Horne's Market, 385 U.S. 23, 87 S. Ct. 193 (1966). With reference to the argument that such denials are appealable as a class, this Court held:

> We take the other view not because 'interlocutory' or preliminary may not at times embrace denials of permanent injunctions, but because the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim.

Id. at 25, 87 S. Ct. at 195.

Unlike Switzerland Cheese Ass'n, supra (involving only appealability of issues of fact), important issues of law were decided in this case. This Court in Switzerland Cheese Ass'n, supra, in referring to "piecemeal appeals" manifestly intended to so characterize only appeals involving issues of disputed fact. On this point Harrington's memo in the court of appeals in support of its motion to dismiss concedes, "Powell's defenses were legal defenses and a ruling in its favor would have barred Harrington from further prosecut-

ing its patent infringement claims as a matter of law." [Emphasis Harrington's.]

The reasoning of this Court in the Switzerland Cheese Ass'n, supra, case saves from its holding denials of motions for summary judgment which, as here, would dispose of affirmative defenses on the merits as a matter of law, thereby resulting in the denial of injunctive relief. The Magistrate's Memorandum stated: "In recommending that defendant Powell's motion for judgment on the pleadings be denied, such a ruling necessarily implies a denial of the defendant's motion for injunction as prayed in Powell's answer." (Memorandum at n. 11, Appendix 42.)

In Chappell & Co. v. Frankel, 367 F.2d 197 (2d Cir. 1966), the Second Circuit overruled its prior decisions holding denials of motions for summary judgment, and thereby injunctive relief, appealable as a class. The court in Chappell & Co. found "most important, the enactment of the Interlocutory Appeals Act of 1958 ... the sort of 'intervening development in the law ...' that frequently justifies a court's reconsideration of its prior rulings, for that Act, which allows interlocutory appeals in those cases in which the argument for interlocutory appeal is most persuasive removes much of the initial justification for our earlier decision." [Emphasis added.] Id. at 201.

The Second Circuit in Chappell & Co., supra, stated that "[w]e admit that when summary judgment and injunctive relief is denied as a matter of law the argument for interlocutory review is most appealing." Id. at 204. The most important reason thus advanced by the Second Circuit for overruling its prior decisions, possibility of relief under § 1292(b), has no application to this appeal. This case is one of those where relief by interlocutory review is "most appealing." This is true because questions of controlling law are presented and the United States Court of Appeals for the Federal Circuit en banc ruled in this case that the court lacks "jurisdiction to consider interlocutory appeals on questions certified to this

court by a district court under 28 U.S.C. § 1292(b)." (Appendix 53, 54.)

Moreover, in patent cases it is far from clear whether certification even to the geographic circuits is still available to appellants. An appellant in a patent case potentially certifiable for appeal by the district court under § 1292(b) is presented with a paradox in the statutes. In a case such as this one, the court of appeals with geographic jurisdiction may have jurisdiction of a petition under § 1292(b) to review interlocutory rulings while the court of appeals for the Federal Circuit also may have contemporaneous jurisdiction under § 1295(a)(1) to review final decisions made in the same order and involving the same controlling question of law.

Neither Switzerland Cheese Ass'n, supra, nor Chappell & Co., supra, support the dismissal of this appeal. Both cases are distinguishable as involving only denials of motions for summary judgment solely by reason of "unresolved issues of fact." This Court in Switzerland Cheese Ass'n, supra, expressly limited the effect of the opinion as precedent to cases of denials based only on the existence of "unresolved issues of fact." 87 S. Ct. at 195. Indeed, the double negative of this Court's ruling, "[w]e take the other view not because 'interlocutory' or preliminary may not at times embrace denials for permanent injunctions," imports the affirmative. 87 S. Ct. at 195. In other words, "interlocutory" within the purview of § 1292 (a)(1) may

at times embrace denials of motions for summary judgment seeking permanent injunctive relief. Powell appealed from such an order in this case. The order is interlocutory in the sense that the complaint on its merits is left pending, though the order also presents final decisions on the merits dismissing important defenses to the complaint.

Unlike Switzerland Cheese Ass'n, the district court's rulings in this action do settle something important about the merits of this action. The rulings settle that in the district court, absent appeal, the former pleadings and the judgment pleaded in bar on the merits do not entitle Powell to an injunction to protect Powell and Powell's dealers against harm in the

market place caused by Harrington's charges of infringement.

The court of appeals found appellate jurisdiction lacking under § 1292(c)(1). In so doing, the court of appeals inappropriately characterized Powell's request for injunctive relief as merely that "Harrington be enjoined from proceeding with this litigation." [Emphasis added.] (Appendix 59.) Powell asked for more than a mere stay of this litigation. Powell prayed for "[a]n injunction ... restraining Harrington and anyone in privity with Harrington from bringing or prosecuting any claim, counterclaim or civil action or otherwise charging that Powell, its agents, vendees, suppliers, licensees, or others in privity with Powell are

infringing, contributing to infringement or inducing infringement of United States Letters Patent Nos. 3,507,103; 3,902,304; 3,601,959; and 3,841,071." (R. App. 77, 78.) Powell's requested injunction would extend into the market place as well as other courts, in time and place well beyond the limits of this specific case, and would not end with a stay or even a final judgment in this action. Powell's prayer for an injunction has practical significance in view of the history of litigious harassment of Powell by Harrington as a competitive device. See Harrington Mfg. Co. v. Powell Mfg. Co., 38 N. C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979). There is as a matter of law a material

distinction between a judgment of dismissal or of stay and a decree imposing a permanent injunction. Powell's motions sought the latter.

A charge of infringement is damaging to the accused product of a competitor in the market place. In this instance, it will give Harrington a substantial, unfair competitive advantage so long as it goes not enjoined.

This Court in Carson v. American Brands, Inc., 450 U.S. 79, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981), held:

> In sum, in refusing to approve the parties' negotiated consent decree, the District Court denied petitioners the opportunity to compromise their claim and to obtain the injunctive benefits of the settlement agreement they negotiated. These constitute 'serious, perhaps irreparable, consequences' that petitioners can

> 'effectually challenge' only by an immediate appeal. It follows that the order is an order 'refusing' an 'injunctio[n]' and is therefore appealable under § 1292(a)(1).

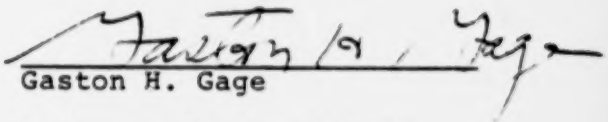
Id. at 89, 101 S. Ct. at 999.

Powell is entitled to the benefits of § 1292(a)(1) by virtue of the provisions of § 1292(c)(1). Powell has likewise been deprived of the "benefits of the settlement agreement" negotiated between Powell and Harrington in the former action. Among the benefits sought by Powell in this action is an injunction to prevent Harrington from making damaging infringement charges barred by the settlement as well as by Rule 13(a) of the Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,



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APPENDIX

APPENDIX:

Appendix 1

FILED FEB- 8 1983 J. RICH LEONARD, CLERK
U. S. DISTRICT COURT E. DIST. NO. CAR.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

No. 82-8-CIV-2

HARRINGTON MANUFACTURING COMPANY, INC. Plaintiff v. POWELL MANUFACTURING COMPANY, INC., Defendant	MEMORANDUM & RECOMMENDATION; ORDER

This matter came before the undersigned United States Magistrate on December 15, 1982, at Raleigh, North Carolina, for a motion hearing on all pending motions. Both parties were represented by able counsel as extensive oral arguments supported by exhibits were conducted. After consideration of said motions, this court hereby makes the following proposed findings of facts

and recommendations for disposition by the district court judge pursuant to 28 U.S. § 636(b)(1)(B):

I. Motion for Summary Judgment with Supporting Memorandum; Motion for Judgment on Pleadings and for an Injunction with Supporting Memorandum.

The defendant Powell Manufacturing Co. [hereinafter Powell] has filed motions for summary judgment and for judgment on the pleadings with regard to this action filed by the plaintiff Harrington Manufacturing Co. [hereinafter Harrington]. Essentially, the defendant's motion for judgment on the pleadings moves the court to enter judgment in the defendant's favor pursuant to Rule 12(c) Fed.R.Civ.P., for the following reasons: (1) a consent judgment entered in a prior action between the parties in the

Appendix 3

Western District of North Carolina incorporates a mutual release by the parties which bars this present action; (2) a failure to assert a compulsory counterclaim pursuant to Rule 13(a), F.R.Civ.P., after judgment in a prior action in the Western District of North Carolina bars the plaintiff from asserting it against the same adversary in the present action; and, lastly, (3) res judicata and collateral estoppel principles bar the present action. In addition, the defendant Powell moves for summary judgment pursuant to Rule 56, Fed.R.Civ.P., on the grounds that failure to assert a compulsory counterclaim in a prior action in the Western District of North Carolina bars the present suit between the same parties.

The court will address these contentions in the order presented.

A.

The defendant Powell first contends that a consent judgment entered between the parties in a prior action in the Western District of North Carolina, entitled Powell Manufacturing Co. v. Harrington Manufacturing Co., No. C-C-75-362, incorporated a mutual release by the parties which imposes an absolute bar to the action now before this court. The settlement between the parties in the prior action was incorporated in a consent judgment after jury arguments on November 10, 1981, and provided in pertinent part:

> Counsel fell to talking about compromise settlement and have now arrived at a compromise and settlement of all matters and things in controversy among them . . .

> In accordance to the foregoing, this action is hereby dismissed with prejudice as to all claims alleged in all the pleadings.

The consent judgment was thereafter signed by the Honorable James B. McMillan, United States District Court Judge of the Western District of North Carolina, and attorneys for both parties (see Exhibit C to the Answer).

The issue before this court is the proper construction of the consent judgment signed by the parties. Any determination of the effect of the consent judgment requires recognition of the dual nature of a consent judgment. A consent judgment has aspects of a private contract as well as aspects of a judicial act. See, e.g., Collins v. Thompson, 679 F.2d 168 (9th Cir. 1982). This process shapes the interpretation

and construction which should be applied. As the Supreme Court noted:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of costs and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not be reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected and the instrument must be construed as it is written, and not as it might

> have been written had the plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971).

The Fourth Circuit's most recent pronouncement on the proper construction of a disputed provision in a consent judgment lies in Willie M. v. Hunt, 657 F.2d 60 (4th Cir. 1981). In its analysis, the court noted that within the "four corners" rule of Armour it is proper to consider (1) the circumstances surrounding the formation of the consent order, and (2) any technical or specialized meaning understood by the parties for the words used in the order. Id. at 60. The court also delineated two cardial principles for interpreting the consent judgment, stating:

> First, that its meaning is properly to be sought within the confines of the judicially approved documents expressing the parties' consent. Second, that its meaning is to be sought in what is there expressed and not in the way it may have been written had the plaintiffs established their full rights in litigation or if it had been written to satisfy the purposes of only one of the parties to it. Id.

The court then determined that the proper meaning of the consent order was to be sought by looking to: (1) the rights and obligations agreed to in the judicially approved stipulations of the parties; (2) the general nature of the remedy agreed upon, and (3) the identity of the named parties who gave their consent to being so bound. Id.

Applying this analysis to the case at bar, this court does not have the authority to expand or contract the

judgment terms to what might have been.[1/] See generally, United States v. ITT Continental Banking Co., 420 U.S. 223, 253 (1974); Ricci v. Okin, 537 F. Supp. 817, 823-24 (D. Mass. 1982); Gautreaux v. Pierce, 535 F. Supp. 423, 426-27 (N.D. Ill. 1982). However, the

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1/ As the plaintiff aptly notes, to the extent that the consent judgment must be construed by this court to ascertain the real intent of the parties, extrinsic evidence must be introduced, thus barring a motion for judgment on the pleadings. See Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings and for an Injunction, at pp. 8-10 (quoting Sellon v. General Motors Corp., 521 F.Supp. 978 (D.Del. 1981). Accordingly, in considering the defendant Powell's motion for judgment on the pleadings, this court limits its consideration of the consent judgment to the "four corners" of the document and the circumstances surrounding its formation. In considering the totality of the circumstances surrounding the formation of the consent judgment, therefore, this court has not considered any extrinsic evidence, as no extrinsic evidence has even been offered to the court.

"four corners" of this consent judgment may be viewed in light of the circumstances surrounding the formation of the consent order, the rights and obligations agreed to in the judicially approved stipulations, and the general nature of the remedy agreed upon.

The consent judgment entered by United States District Judge McMillan dismissed the prior suit in the Western District of North Carolina "with prejudice as to all claims alleged in all the pleadings" (emphasis added). From a perusal of the pleadings in the Western District case, the allegations contained in the pleadings in that suit related to certain of the plaintiff Harrington's advertising and promotional activities which allegedly constituted acts of

unfair competition. Plaintiff Harrington has henceforth filed the present action against the defendant Powell for infringement of four patents owned by Harrington. Despite the fact that none of the four patents now in suit were introduced as evidence at trial or in settlement negotiations in the prior action, the defendant has filed a motion for judgment on the pleadings in an effort to include the plaintiff's claims for patent infringement. This court cannot go that far.

It is clear from the "four corners" of the consent judgment itself that the settlement was drawn to encompass the claims alleged in the pleadings in the prior suit. The language of the judgment does not delineate any other expansive reading. In addition, in

light of the totality of the circumstances which have surrounded this litigation, it is the opinion of this court that the scope of the consent judgment must be limited to defendant Powell's prior claim of unfair competition. First, the rights and corresponding obligations agreed to in the judicially approved document only reveal the settlement of an ongoing civil proceeding concerning unfair competition, and do not in any way reveal a compromise of the totality of all present or potential proceedings to be decided in the future. Moreover, the general nature of the remedy agreed upon in the prior proceeding - "dismissed with prejudice" - dealt with both parties' waiving the opportunity to have their rights and obligations determined

under the unfair competition litigation only, nothing more, nothing less. In fact, any indication that the issue of patent infringment was considered in the prior proceeding and settlement had simply not arisen yet. Lastly, although not dispositive standing alone, the identity of the parties in the prior action was reversed - with Powell being the plaintiff in the prior action, and the defendant in the present action. Such role reversals in comparing the two proceedings reveal a limitation of the application of the consent judgment to the prior proceeding, and effectively reveal the intended limited scope of the current decree.

In determining the proper construction of this consent judgment, this court is not free to substitute its

judgment for that of the parties.[2/] See Fox v. United States Department of Housing, and Urban Development, et. al., 680 F.2d 315 (3rd Cir. 1982). This consent judgment represents a compromise between the parties, "in exchange for the saving of cost and elimination of risk, the parties each gave up something they might have won had they proceeded with the litigation." United States v. Armour, 402 U.S. at 682. Consideration of the judgment order itself, the totality of the circumstances surrounding its signing, and the general

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2/ Nor is this court free to consider Judge McMillan's letter to define the scope of the consent judgment presently under consideration. Hence, any findings by this court concerning the breadth of the consent judgment were attained without reference to Judge McMillan's comments. See Fayerweather v. Ritch, 195 U.S. 276 (1904).

nature of the remedy sought by the plaintiff supports the conclusion that the plaintiff Harrington is entitled to limiting the scope of the consent judgment to the prior proceedings which it resolved. Accordingly, obedience to the "four corners" rule of Armour and all applicable construction considerations mandates that this court recommend that the defendant Powell's motion for judgment on the pleadings as to this contention be hereby DENIED.[3/]

3/ In so recommending, this court finds it unnecessary to consider the plaintiff Harrington's arguments that the defendant's motion for judgment on the pleadings cannot be granted because it is based on material issues of fact raised by Powell's answer (See Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings and for an Injunction, pp. 3-5).

B.

The defendant Powell's second contention regarding the plaintiff's failure to assert a compulsory counterclaim in a prior action, thereby barring it against the same adversary in the present action, is essentially raised twice - both in the defendant's motion for judgment on the pleadings and the defendant's motion for summary judgment. Accordingly, since these motions are supported by affidavits and material other than the mere pleadings, this court will treat the motion as one for summary judgment pursuant to Rule 56, Fed.R.Civ.P., for purposes of this memorandum and recommendation. Rules 12(c) and 56(e), Fed.R.Civ.P.

As previously mentioned, the defendant Powell contends that Harrington's

claims of patent infringment are barred by Rule 13(a) of the Federal Rules of Civil Procedure, in view of the pleadings, proceedings, and consent judgment in the prior Western District action. In the Western District action, Powell had sued Harrington for certain acts of unfair competition relating to the structure, promotion, marketing and sale of tobacco harvesting equipment made by Harrington. Powell had alleged that Harrington's sales of its tobacco harvesting equipment, as a result of Harrington's acts of unfair competition, had decreased Powell's sales of its tobacco harvesting equipment. In Harrington's answer to the pleadings, Harrington essentially denied the allegations in the original and amended complaints. After a full jury trial

on the merits, settlement discussions were held, and a consent judgment signed by all parties was entered. The defendant Powell in the present action now contends that Harrington failed to include any counterclaim in the prior action alleging that the construction, manufacture, promotion, marketing and sale of Powell's tobacco harvesters infringed any Harrington patent rights, even though Harrington was well aware at the time of the claims of patent infringment it is now asserting against Powell. Consequently, the defendant Powell contends that failure to assert such a compulsory counterclaim bars Harrington's present claim for four patent infringements.

Appendix 19

Rule 13(a) of the Federal Rules of Civil Procedure provides in a pertinent part that a party is required to ". . . state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject of the opposing party's claims . . ." Such counterclaims are labeled as "compulsory" by Rule 13(a) since the purpose of the rule is "to enable the court to settle all related claims in one action, thereby avoiding a wasteful multiplicity of litigation on claims arising from a single transaction or occurrence." Wright & Miller, 6 Federal Practice and Procedure: Civil § 1409, p. 37 (1971). Further, courts have recognized that "[t]his clause, together with its

predecessors, has consistently been given a broad interpretation" in order to avoid such multiplicity of suits. United States Fruit Co. v. Standard Fruit and Steamship Co., 282 F.Supp. 388, 389 (D.C. Mass. 1968). See generally, Moore v. New York Cotton Exchange, 270 U.S. 593 (1926); Moore's Federal Practice, 1974, Vol. 3, p. 13-300. Accordingly, this court must now determine whether the litigated and settled claim arising in the past Western District proceeding arose out of the same transaction or occurrence that is the subject matter of the present claim by the opposing party.[4/]

4/ In so narrowing the issue before this court to a consideration of the "transaction or occurrence" test, this court chooses to ignore the plaintiff's argument in opposition to the defen-

dant's motion for summary judgment apparently dealing with a possible exception to the compulsory counterclaim requirement. See Plaintiff's Opposition to Motion of the Defendant for Summary Judgment, pp. 11-16. Rule 13(a) does contain four express exceptions to the general rule that a compulsory counterclaim must be asserted if it arises out of the same transaction as the opposing party's claim, but none are applicable to the case at bar. Most notably, the plaintiff contends that Harrington did not have to assert a counterclaim that had not matured at the time Harrington filed its answer. However,

> "this exception to the compulsory counterclaim requirement necessarily encompasses a claim that depends upon the outcome of some other lawsuit and thus does not come into existence until the action upon which it is based has terminated. For example, it has been held that a claim for malicious prosecution cannot be a compulsory counterclaim in the allegedly wrongfully prosecuted action." Wright & Miller, Federal Practice and Procedure: Civil § 1411, p. 56 (1971).

Consequently, this exception is inapplicable to the present claim since the counterclaim alleged to be necessary to the prior suit did not depend on the outcome of some other main lawsuit.

The key to a proper application of Rule 13(a) to the prior Western District action lies in applying the "transaction or occurrence" concept to the facts and circumstances of that cause of action. Rather than attempting to define the key terms of Rule 13(a) precisely, the Fourth Circuit approaches questions of whether a counterclaim arose out of the same transaction or occurrence as the original claim by applying the four tests adopted by the court in Sam & Sue Mfg. Co. v. B-L-S Constr. Co., 538 F.2d 1048, 1951-1053 (4th Cir. 1976). In Sam & Sam, the Fourth Circuit adopted the various tests synthesized by Wright and Miller, Wright & Miller, § 1410, p. 42, and these tests are applied here.[5/]

5/ Although this court is cognizant of the "logical relationship" rule, as set

1. Are the issues of fact and law raised by the prior Western District claim of Powell for unfair competition and Harrington's present patent infringement claim largely the same?

Applying this test to the 1976 and 1982 claims, this court finds that Powell's claim in the prior suit largely involved the law of unfair competition. It was based almost entirely upon Harrington allegedly "passing off" Powell's "cutter bar" blade assembly as its own. Although Powell states that

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forth in United States Fruit v. Standard Fruit and Steamship Co. 282 F.Supp. 338 (D.C. Mass. 1968), employed by the North Carolina Court of Appeals in a prior state proceeding between the parties, the court will consider those principles only in the framework laid out by the Fourth Circuit in approaching such compulsory counterclaim issues.

its "passing off" claims and Harrington's present infringement claims both arose out of alleged wrongful acts in the use of Powell's products, Powell's observation of the claims is too limited. The essence of a claim for "passing off" is whether one has deceived or confused the public by selling the goods of another as one's own. Howe Scale Co. v. Wykoff, Seamen's & Benedict, 198 U.S. 118, 140 (1905); Volkswagenwerk Aktiengesellschaft v. Rickard, 492 F.2d 474, 478 (5th Cir. 1974). Consequently, "[u]nfair competition goes to the question of marketing, not to the question of manufacture." B. H. Bunn Co. v. AAA Replacement Parts Co., 451 F.2d 1254, 1263 (5th Cir. 1971). Proof of unfair competition is established when the plaintiff provides evidence of a likelihood that

consumers would be confused or deceived by the alleged acts of passing off. Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 384 (5th Cir. 1977).

In contrast, Harrington's present action claims that Powell committed acts of manufacturing and selling equipment which infringed four of Harrington's harvester patents. Hence, this case largely involves the federal law of patents and patent infringement. A finding of patent infringment necessarily involves first determining the scope of each of the four specified patent claims alleged to be infringed. Grover Tank and Mfg. Co. v. Linde Air Prod. Co., 399 U.S. 605, 608 (1950). Each claim is then compared with the accused device on

an element-by-element basis. Marston v. J. C. Penney Co., 353 F.2d 976, 985 (4th Cir. 1965), cert. denied, 385 U.S. 974 (1966). Thus, the facts necessary for the elements of proof are different. In the prior suit for unfair competition, the issues centered on a determination of whether or not consumers were likely to be confused as to the source of origin of the goods by Harrington's alleged mounting of a "cutter bar" on its harvester. In the present suit, the infringement issue requires a comparison between the claims of the Harrington patents and various features of the Powell harvesters, different from the "cutter bar," to determine whether all four of Harrington's patents have been infringed. Furthermore, in this patent infringement action, the

validity of the four Harrington patents requires factual proof of the federal statutory prerequisites for patents different from the unfair competition claim. So the answer to Question 1 must be no since the prior determination of Powell's unfair competition claim and the present determination of Harrington's patent infringement claim raise entirely different issues of fact and law.

2. Would res judicata bar Harrington's subsequent suit for patent infringement absent the compulsory counterclaim rule?

For the same reasons enunciated above, the answer to this question must also be an unqualified no. The 1976 claim and the present claim are entirely unconnected. Although the parties are

the same, the facts to be proved are entirely different; the issues are different; the causes of action did not arise at the same time and have no connection with the acts giving rise to the present claim. The cause of action in one is an action for unfair competition and in the other an action for patent infringment. The 1976 unfair competition claim had no connection at all to any aspect of the present patent infringement claim except that they generally relate to tobacco harvesters. Both the facts and the issues are entirely unrelated, and this court must follow the general principle that a final judgment on the merits in one cause of action is not a bar to a suit on a different cause of action. Newport News Shipbuilding & Drydock Co. v.

Director, 583 F.2d 1273, 1278 (4th Cir. 1978).[6/]

3. Will substantially the same evidence support or refute Powell's unfair competition claim as well as Harrington's claims for patent infringement?

Again, the answer to Question 3 must be an unqualified no as it relates to Powell's unfair competition claim. Although both claims are related generally to the tobacco harvesters manufactured by Powell and Harrington, the elements of the two causes of action require evidence on separate and distinct aspects of their respective

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6/ See also page 15 of this Memorandum and Recommendation for further discussion of res judicata principles. [Appendix at p. 36.]

business concerns. In the Western District action, all of the evidence was principally addressed to the advertisement and promotion in the fall of 1974 of a single Harrington harvester on which it had allegedly mounted a Powell "cutterbar." On the other hand, the primary evidence to be offered by Harrington in the instant action will be upon the four patents allegedly infringed, together with Powell's alleged infringement of a Powell Generation III harvester manufactured almost two years after the prior action. In fact, none of these four Harrington patents have ever been considered in the prior Powell claim. Hence, none of the factual inquiries necessary to determine the validity of the Harrington patents have any relation to Powell's earlier

"passing off" claim which was the subject matter of the prior suit. Further, even the proofs as to damages involve completely different time frames, different equipment, different parties' damages, and different measures of damages. Thus, the evidence required to support or refute each of the claims in question is not substantially the same. See, e.g., North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 85 F.R.D. 249, 251 (M.D.N.C. 1979).

4. Is there any logical relation between Powell's unfair competition claim and Harrington's claims for patent infringement?

As with the previous three questions, with respect to Powell's 1976 claim, the answer must be no. Although Powell,

along with a majority of the courts, have placed great emphasis on the "logical relation" test, this court does not find it applicable here. Even though both parties are engaged in the manufacture of tobacco harvesters, there is no connection between Powell's claim of unfair competition which arose in 1974, and Harrington's claim for patent infringement which first arose around 1978. As previously mentioned, differences in time, the two causes of action, the cause of the damage, the proof of facts, and the legal issues involved would rule out a logical relation between Harrington's four patent infringement claims and Powell's prior unfair competition claim. See, e.g., Claire v. Kostar, 138 F.2d 828 (2d Cir.

1943); Xerox Corp. v. SCM Corp., 576 F.2d 1057 (3rd Cir. 1978).

Thus, this court has considered the four tests outlined by the Fourth Circuit in Sam & Sue, while adhering to the inflexible parameters of Moore v. New York Cotton Exchange, supra.[7/] Applying these tests, the court notes that the answer to each of the four tests used by the courts is an unqualified no. Under such circumstances, this court is of the opinion that Harrington's patent infringement claims did not arise out of the 1974 "transaction" which formed the

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7/ This court has at all times been aware of the good and bad points of such an approach, but finds no occasion to distinguish between the rules since the answer to all of the questions is an unqualified no. See Wright & Miller, § 1410.

basis of Powell's complaint in the prior Western District action; and, accordingly, genuine issues of material fact still remain in the present action to preclude application of Rule 56, Fed. R.Civ.P.[8/] Accordingly, this court must recommend that the defendant Powell's motions for summary judgment and for judgment on the pleadings be hereby DENIED.[9/]

8/ For cases similar to the result found here, wherein it was held that defendant's claim charging plaintiff with patent infringement was not a compulsory counterclaim when plaintiff previously sued for unfair competition, see generally Derman v. Stor-Aid, Inc., 141 F.2d 580 (2d Cir. 1944), cert. denied, 323 U.S. 85 (1945); Niash Ref. Co. v. Sydney Berman & Co., 89 F. Supp. 539 (D.C.N.Y. 1950); Dow Chemical Co. v. Melton Corp. 281 F. 2d 292 (4th Cir. 1960).

9/ In so recommending a denial of Powell's motion for summary judgment, this court finds it unnecessary to

C.

The defendant Powell lastly contends that res judicata or collateral estoppel principles bar the present action. The doctrine of res judicata which provides that "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153 (1979). In order for res judicata or collateral estoppel[10/]

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consider the possible effects a Rule 13(a) bar might have with respect to Harrington's patent infringement claims occurring after March 5, 1981. See Plaintiff's Opposition to Motion of the Defendant for Summary Judgment, pp. 28-29.

10/ See Nash County Board of Education v. Biltmore Co., 640 F.2d 484, 490 (4th Cir. 1981), cert. denied, 102 S. Ct. 359 (1981)(where the Fourth Circuit, ir

to apply, the following essential requisites must be satisfied: "(1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and later suit, and (3) an identity of parties or their privies in the two suits." Nash County Board of Education v. Biltmore Co., 640 F.2d 484, 486 (4th Cir. 1981), cert. denied, 102 S. Ct. 359 (1981).

At the outset, the Fourth Circuit does recognize the general rule that a consent judgment will support the requirement of a final judgment under

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applying the same tests for res judicata to collateral estoppel, noted that it is "proper to assume that the same rule(s) would apply . . . since collateral estoppel is generally regarded as merely a 'branch' or 'other prong' of res judicata.")

either res judicata or collateral estoppel. Nash, 640 F.2d at 486, Rector v. Suncrest Lumber Co., 52 F.2d 946, 948 (4th Cir. 1931). However, the defendant's position falters under the second requirement for res judicata the identity of the causes of action. Although it is true that in recent years the courts have defined the term "claim" for res judicata purposes in an expansive manner, see, e.g., Blondes Tongue Laboratories, Inc., v. University of Illinois Foundation, 402 U.S. 313, 329 (1971), any comparison of the two suits presently under consideration reveals separate and distinct claims. As previously mentioned, Powell sued Harrington in the prior suit for unfair competition, while Harrington claims in the present suit are based upon four patent infringements.

Although the two suits involve the same parties, they involve competely different subject matter, separate wrongful acts, and different federal statutes asserted by the opposite parties and raising separate factual disputes. In both cases, the evidence will be different, and the damages recoverable and the relief available dissimilar. Accordingly, this court finds little support for an application of the doctrine of res judicata in the case at bar, and must recommend that the defendant Powell's motion for judgment on the pleadings as to this contention be hereby DENIED.

II. Motion to Strike and Supporting Memorandum.

Defendant Powell further moved the court, pursuant to Rule 12(f), Fed.R.

Civ.P., for an order striking paragraph 11 from the amended complaint on the grounds that said paragraph contained immaterial matter in that the trial, judgment and opinion in the case entitled Harrington Manufacturing Co., Inc. v. Taylor Tobacco Enterprises, Inc., 664 F.2d 938 (4th Cir. 1981), was irrelevant and immaterial to the issues in this action. This court is in agreement. At the outset, the Taylor verdict can in no way be construed to be res judicata or collateral estoppel against Powell, Powell not having been a party to any of the issues, factual or legal, in that action. See Nash, supra. Moreover, this court is not persuaded that a jury verdict in a prior unrelated action can be classified as stare decisis in a later suit against an unrelated party.

The ultimate question of patent validity in Taylor was submitted to the jury as a question of fact, and not decided by the court as a matter of law. In fact, the Fourth Circuit chose not to review the question of validity on the merits as one of law, but merely held submission of it to the jury was not "reversible error." Taylor, supra. It is well-settled that stare decisis is a doctrine applicable only to questions of law decided by a court or judge, and inapplicable to determinations of a jury whose province is confined to questions of fact. 5 Moore's Federal Practice, § 38.02 (2d ed. 1948). Although some questions were raised by the defendant as to whether the Fourth Circuit even has jurisdiction over patent infringement cases any longer, thereby not making its

decisions binding on this court, see, e.g., South Corp. v. United States, Appeal No. 82-19 (C.A.F.C. Oct. 28 1982)(where the United States Court of Appeals for the Federal Circuit held en banc that it would consider itself bound by the United States Court of Claims and the United States Court of Customs and Patent Appeals), the simple fact that the Fourth Circuit's decision in Taylor was limited to the holding that the submission of patent validity to the jury was not reversible error precludes the application of stare decisis as a matter of law in the present action. Accordingly, this court ORDERS that the defendant Powell's motion to strike paragraph 11 from the amended complaint is hereby GRANTED.

III. Petition for Reconsideration of the Magistrate's Order of September 24, 1982 Denying Defendant's Motion to Stay Discovery; Motion for Protective Order.

Pursuant to the undersigned United States Magistrate's Order filed September 24, 1982, this court denied defendant Powell's motion to stay all discovery. For all practical purposes, a stay of all discovery has been in effect from the date of the oral arguments on December 15, 1982, herein until the present ruling. As this court has made recommendations on all outstanding motions for summary judgment and judgment on the pleadings[11/] in favor

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11/ In recommending that defendant Powell's motion for judgment on the pleadings be DENIED, such a ruling necessarily implies a denial of the defendant's motion for injunction as prayed in Powell's answer.

of the plaintiff, discovery should henceforth commence. Accordingly, the defendant Powell's petition for reconsideration of the Magistrate's Order of September 24, 1982 denying defendant's motion to stay discovery and motion for protective order are hereby DENIED.

SO ORDERED AND RECOMMENDED. This the 8th day of February, 1982.

/s/ Charles K. McCotter, Jr.
CHARLES K. McCOTTER, JR.
United States Magistrate

Appendix 44

FILED MAY 24 1983 J. RICH LEONARD, CLERK, U. S. DISTRICT COURT E. DIST. NO. CAR.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

HARRINGTON MANUFACTURING COMPANY, INC.,	)	
Plaintiff	)	NO. 82-8-CIV-2
VS.	)	O R D E R
POWELL MANUFACTURING COMPANY INC.,	)	
Defendant	)	

Harrington Manufacturing Company, Inc., plaintiff, brought this patent infringement action against Powell Manufacturing Company, Inc., for the infringement of four of plaintiff's patents relating to its tobacco harvester. Jurisdiction is pursuant to 28 U.S.C. § 1338, and the action is presently before the court on objections

to United States Magistrate Charles K. McCotter, Jr.'s memorandum and recommendation that Powell's motions for judgment on the pleadings and summary judgment be denied. After a thorough and independent review of the record, the Magistrate's memorandum and recommendation, and the objections thereto, the Magistrate's memorandum and recommendation, with the one exception noted below, is correct and in accordance with law and is therefore adopted by the court as its own.

This action can best be understood in light of the previous litigation between the parties in the United States District Court for the Western District of North Carolina. On November 28, 1975, Powell filed a complaint in that court against Harrington for violating

15 U.S.C. § 1125 by passing off Powell's goods as its own. The action arose out of a three-day advertising campaign by Harrington, a subsequent three-day demonstration at Ahoskie, North Carolina and ten days of advertising at the North Carolina State Fair in Raleigh, North Carolina, all of which occurred in the fall of 1974. Harrington answered Powell's complaint in 1976 by generally denying its allegations. The complaint was amended in early 1981 to allege that these same acts on which the original complaint was based amounted to an unfair and deceptive trade practice under N.C.G.S. § 75-1.1. Harrington amended its answer again denying the allegations. The action was settled at the close of a two-day jury trial in November, 1981.

Harrington subsequently brought this action for patent infringement on April 6, 1982, alleging that because of modifications to Powell's tobacco harvester in 1978, the harvester now infringed four of Harrington's patents. Powell filed the present motions for summary judgment and judgment on the pleadings arguing that (1) the consent judgment in the Western District action constituted a mutual release by the parties which bars the present action; (2) the patent infringement claims were compulsory counterclaims to the passing off and unfair trade practices claims in the Western District action and are therefore lost; and (3) the action is barred by res judicata and collateral estoppel.

As previously stated, the court agrees with the Magistrate's memorandum and accepts his recommendation with one exception. Harrington argues that its patent infringement claims did not arise until Powell modified its harvester in 1978. Thus assuming the patent infringement claims would ordinarily be compulsory counterclaims to claims under 15 U.S.C. § 1225 or to claims of unfair trade practices, they were not compulsory in this instance because of the exception to Rule 13(a) which only requires the pleader to state any existing counterclaims which arise out of the same transaction or occurrence, and Harrington filed its original answer two years before the modifications resulting in the alleged infringement.

The Magistrate, though correct in concluding that the exception was inapplicable under these circumstances, took the narrow view that this exception applies only to claims that "depend on the outcome of some other main lawsuit." It is true that this exception "necessarily encompasses a claim that depends on the outcome of some other lawsuit," Wright & Miller, Federal Practice and Procedure: Civil § 1411, p. 56 (1971); however it does not depend exclusively on the outcome of another lawsuit. The Rule 13(a) exception should be read to apply not only to claims that are yet to mature, but also to counterclaims "acquired by defendant after he has answered ...." Wright & Miller, Federal Practice and Procedure: Civil § 1411,

p. 55 (1971); see United States v. Chelsea Towers, Inc., 295 F. Supp. 1242 (D.N.J. 1967).

Accordingly, except as noted the Magistrate's recommendation is adopted with respect to all other bases for defendant's motions for judgment on the pleadings and summary judgment and the motions are denied.

SO ORDERED.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

May 23, 1983

Appendix 51

FILED MAY 31 1983 J. RICH LEONARD, CLERK U. S. DISTRICT COURT E. DIST. NO. CAR.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA ELIZABETH CITY DIVISION

HARRINGTON MANUFACTURING COMPANY, INC., Plaintiff	NO. 82-8-CIV-2
VS.	O R D E R
POWELL MANUFACTURING COMPANY, INC., Defendant	

Upon the request of defendant Powell Manufacturing Company, Inc., that the court's order of May 24, 1983 be certified for immediate appeal to the Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1292(b) the court is of opinion that the order does involve a controlling question of law as to which there is substantial ground for difference of opinion and that an

immediate appeal from the order may materially advance the ultimate termination of this litigation. Defendant's request is therefore granted.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

May 31, 1983.

Appendix 53

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HARRINGTON MANUFACTURING COMPANY, INC. a North Carolina Corporation	)	
Plaintiff,	)	
v.	)	Miscellaneous Docket No. 19
POWELL MANUFACTURING COMPANY, INC. a North Carolina Corporation	)	
Petitioner-Defendant.	)	

ORDER

Having considered in banc* the PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. SECTION 1292(b) presented by Powell Manufacturing Co., Inc., and noting the absence from the Federal Courts Improvement Act, Public Law 97-164, of a grant of jurisdiction to consider interlocutory appeals on questions certified to this court by a

district court under 28 U.S.C. § 1292(b), it is ORDERED:

That the Petition be, and it is hereby, denied for lack of jurisdiction.

FOR THE COURT

22 June 83
Date

/s/ Howard T. Markey
Howard T. Markey
Chief Judge

*Circuit Judge Friedman took no part in the consideration and denial of the petition.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HARRINGTON MANUFACTURING COMPANY, INC., a North Carolina corporation,	)	
Plaintiff-Appellee,	)	Appeal No. 83-1142
v.	)	
POWELL MANUFACTURING COMPANY, INC., a North Carolina corporation,	)	On Motion
Defendant-Appellant.	)	

Before MARKEY, Chief Judge, NICHOLS and BENNETT, Circuit Judges.

O R D E R

Defendant-Appellant, Powell Manufacturing Company, Inc. ("Powell"), seeks appellate review under 28 U.S.C. § 1295(a)(1) of a district court order denying Powell's motions for judgment on the pleadings and summary judgment. The

magistrate who recommended this order to the district court noted that a denial of Powell's motion for judgment on these pleadings necessarily implied a denial of Powell's motion for injunction as prayed in its answer. Upon the district court's adoption of virtually all of the magistrate's recommended order, Powell also seeks appellate review under 28 U.S.C. § 1292(c)(1). At this point in the proceedings, however, neither § 1295(a)(1) nor § 1292(c)(1) gives us jurisdiction over this case.

Powell first contends that under the collateral order doctrine, the district court's order should be treated as a "final decision" for purposes of appeal under § 1295(a)(1). We disagree. Generally, a distrct court's denial of motions for summary judgment and

judgment on the pleadings are not considered final decisions. That portion of the district court's order concerning the consent judgment does not fall within the narrow exception carved out by the collateral order doctrine. So long as the order leaves the issue open, unfinished, or inconclusive, there may be no intrusion by appeal. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). Here, the district court's order does not finally resolve the issue whether that consent judgment now bars plaintiff-appellee, Harrington Manufacturing Co., Inc. ("Harrington"), from pursuing its infringement claims. Because the order merely denied Powell's motions for summary judgment and judgment on the pleadings, Powell can still press the

issue by introducing extrinsic evidence at trial to prove its assertions regarding the real intent of the parties as reflected in the consent judgment.

Powell also seeks appellate review under § 1295(a)(1) of the portion of the order rejecting the argument that Harrington is now barred from pursuing its claims for failure to assert these claims as compulsory counterclaims against Powell in prior litigation. Clearly this portion of the order is interlocutory, not final. Moreover, this aspect of the order cannot be considered an appealable collateral order because the decision involved can be reviewed and corrected if and when final judgment results. Cohen at 546.

The second jurisdictional basis for appellate review upon which Powell

relies is § 1292(c)(1), which gives this court jurisdiction of certain appeals from a district court's interlocutory orders refusing injunctions. Powell's motion for injunction, however, is essentially a misnomer, for it adds nothing to Powell's motions for summary judgment and judgment on the pleadings. In its answer before the magistrate, Powell had requested that Harrington be enjoined from proceeding with this litigation, supposedly contrary to the terms of the consent judgment. At the same time, Powell predicated its motions for summary judgment and judgment on the pleadings on an identical ground: that the terms of the consent judgment barred Harrington's present claims. Had the district court granted these motions, Powell's request for injunctive relief

would have been superfluous. When the magistrate denied these motions, he correctly pointed out that this denial necessarily implied a denial of injunction. It is a misnomer to call a request that a court exercise a control over the very case before it a request for injunctive relief, and appellant cannot, by giving its motion that name, bring the case under a statute dealing with requests for injunctive relief properly so called. We reject this attempt.

Although we find Harrington's arguments more persuasive than those posed by Powell, at this point Powell's pursuit of the appeal does not warrant our discretionary imposition of damages and costs under Rule 38 of the Federal Rules of Appellate Procedure. Others

have argued as unpersuasively as Powell without incurring the opprobrium of Rule 38 sanctions.

For the above reasons, IT IS ORDER THAT:

1. Plaintiff-appellee Harrington's motion to dismiss the appeal is granted.

2. Plaintiff-appellee Harrington's motion for leave to file a reply to defendant-appellant Powell's opposition to Harrington's motion to dismiss is granted.

3. Plaintiff-appellee Harrington's request for damages and costs is denied.

BY THE COURT

SEP 16 1983 /s/ Philip Nichols, Jr.
Philip Nichols, Jr.
Circuit Judge

Appendix 62

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HARRINGTON MANUFACTURING CO., INC., ETC.,	)	NO. 83-1142
Appellee,	)	Dist Ct. No. 82-008-CIV-2
v.	)	
POWELL MANUFACTURING COMPANY, INC., ETC.,	)	
Appellant.	)	

JUDGMENT

ON APPEAL FROM THE US District Court of North Carolina; Eastern Div. THIS CAUSE HAVING BEEN HEARD AND CONSIDERED, IT IS ORDERED AND ADJUDGED: DISMISSED, on Appellee's Motion to Dismiss.

DATED Sept. 19, 1983

ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk

Appellant's Petition for Rehearing, Denied, October 28, 1983, Appellant's Suggestion

for Rehearing En Banc, Declined, October 28,1983.

/s/ George E. Hutchinson
Clerk

ISSUED AS A MANDATE: November 14, 1983

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

HARRINGTON MANUFACTURING CO., INC. a North Carolina corporation,	)	
Appellee,	)	Appeal No. 83-1142
v.	)	
POWELL MANUFACTURING COMPANY, INC., a North Carolina corporation,	)	On Motion
Appellant.	)	

Before Markey, Chief Judge, NICHOLS, Senior Circuit Judge, and BENNETT, Circuit Judge.

O R D E R

Having considered appellant's petition for rehearing and suggestion for rehearing in banc,

IT IS ORDERED that

1. Appellant's petition for rehearing is denied.

2. The majority of judges on active service not having voted in favor of rehearing *in banc*, the suggestion for such rehearing is also denied.

BY THE COURT

OCT 27 1983 /s/ Philip Nichols Jr.
Date Philip Nichols Jr.
Senior Circuit Judge

Appendix 66

IN THE DISTRICT COURT OF THE
UNITED STATES

FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
Charlotte Division

Powell Manufacturing Company, Inc. Plaintiff,	)	
-vs-	)	C-C-75-382
Harrington Manufacturing Company, Inc.,	)	JUDGMENT
Defendant.	)	

This action was tried to a conclusion of all the evidence and the eloquent arguments of counsel for both sides on November 9 and 10, 1981.

Counsel fell to talking about compromise settlement and have now arrived at a compromise and settlement of all matters and things in controversy among them and there has been paid and received a sum certain in completion of

that settlement except for costs, which will be billed to the defendant by the Clerk and paid by the defendant.

In accordance to the foregoing, this action is hereby dismissed with prejudice as to all claims alleged in all the pleadings.

This 10th day of November, 1981.

/s/ James B. McMillan
United States District Judge

We consent:

/s/ Gaston H. Gage

/s/ Joseph W. Grier, Jr.
Attorneys for Plaintiff

/s/ W. W. Pritchett, Jr.

/s/ Stephen R. Burch
Attorneys for Defendant

Appendix 68

LIST OF PARENT CORPORATION,
AFFILIATED CORPORATIONS, AND
SUBSIDIARY CORPORATIONS,
PURSUANT TO RULE 28.1

Parent Corporation:

Rowe Corporation

Affiliated Corporations:

R. H. Bouligny, Inc.
The Bouligny Company
Power Equipment Company
Powell Agri-Systems Limited
Bennettsville Advertising
Company, Inc.
Electrozot Corporation
R. H. Bouligny Europa GmbH
Wilkvard Company
Wood-Hopkins Contracting Company
Queen City Constructors, Inc.
Rokor Corporation

Subsidiaries:

None